U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 19 July 2004

In the Matter of
BETTY YURIKO SUENISHI
Claimant

v.

NAVY EXCHANGE
SERVICE COMMAND
Employer/Carrier

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party in Interest

Case Nos.: 2003 LHC 560
2003 LHC 561
2003 LHC 562
2003 LHC 563

OWCP Nos.[1]: 15-45846
15-41346
15-40906
15-46446

Appearances: Mr. Steven M. Birnbaum, Attorney
For the Claimant

Mr. William N. Brooks, II, Attorney
For the Employer

Before: Richard T. Stansell-Gamm
Administrative Law Judge

DECISION AND ORDER
DENIAL OF BENEFITS

This case involves several claims filed by Ms. Betty Suenishi for disability compensation and medical benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 to 950, as amended ("Act"), as made applicable by the Non-Appropriated Fund Instrumentalities Act, 5 U.S.C. §§ 8171 to 8173.

On October 28, 2002, through counsel, Ms. Suenishi filed a pre-hearing statement seeking disability compensation and medical benefits for right knee injuries, a left knee injury, and cumulative trauma injuries to both knees that she suffered while working for, and due to her employment with, the Navy Exchange Service Command ("Navy Exchange" and "Employer"). On November 22, 2002, the District Director forwarded the pre-hearing statement to the Office

[1]The dates of injury and corresponding OWCP numbers are: December 1, 1996 / 15- 40906; August 29, 1997 / 15 - 41346; November 10, 2001 / 15 - 45846; and, October 28, 2002 / 15- 46446 (Transcript, pages 15 to 17).

of Administrative Law Judges. Pursuant to a Notice of Hearing, dated January 29, 2003 (ALJ I),[2] I conducted a formal hearing on May 16, 2003 in Honolulu, Hawaii, attended by Ms. Suenishi, Mr. Birnbaum, and Mr. Brooks. My decision in this case is based on the hearing testimony and all the documents admitted into evidence: CX 1 to CX 3[3] and EX 1 to EX 9.

ISSUES

1. Medical benefits for the following two injuries:

    A. Right knee injury, December 1, 1996

    B. Right knee injury, August 20, 1997

2. Left knee injury, November 10, 2001

    A. Course of employment

    B. Nature and extent of disability

    C. Medical benefits

3. Cumulative bilateral knee injuries, October 28, 2002

    A. Causation

    B. Medical benefits

Parties' Positions

Claimant[4]

As a sales associate with the Navy Exchange (a military department store) for fifteen years, Ms. Suenishi typically works 30 hours a week. As part of her duties, Ms. Suenishi moves merchandise and stocks shelves. At times, she has to carry more than 25 pounds. To stock high shelves, Ms. Suenishi must climb ladders; to reach bottom shelves, she must squat. Ms. Suenishi has continued to work even though she is in pain. On many occasions, the Employer has caused her to work beyond her physical limitations. Ms. Suenishi also works 40 hours a week at a

[2]The following notations appear in this decision to identify exhibits: CX – Claimant exhibit; EX – Employer exhibit; ALJ – Administrative Law Judge exhibit; and TR – Transcript.

[3]At the conclusion of the hearing, I left the record open for receipt of Dr. Walcyk's deposition (TR, page 22). In June 2003, I received Dr. Walcyk's May 13, 2003 deposition and now admit the document as CX 3. I also gave the Employer two weeks to respond to an exhibit mentioned in Dr. Walcyk's deposition (TR, page 24). I received nothing further from the Employer.

[4]TR, pages 6 to 12, 15 to 17, 28 to 30, and closing brief, dated September 8, 2003.

geriatric hospital. However, that job is chiefly sedentary and only requires her to sit behind a desk.

During the course of her employment at the Navy Exchange, Ms. Suenishi has suffered multiple injuries to her knees. On December 1, 1996 and August 20, 1997, Ms. Suenishi injured her right knee. She seeks medical benefits for those two injuries.

On November 10, 2001, Ms. Suenishi injured her left knee as she was moving her car between two designated employee parking areas. Through her credible pain complaints and medical evidence, Ms. Suenishi has invoked the presumption under Section 20 (a) that her left knee injury was work-related. The Employer has not rebutted that presumption. Ms. Suenishi missed work and took a variety of sick leave, holiday hours, and other leave, totaling about 26 hours. She seeks disability compensation in the form of reimbursement for those lost hours. Her rate of pay at the time was $9.26 an hour. Additionally, due to her left knee injury, Ms. Suenishi's activities have been permanently curtailed. As a result, even though she may not have a left leg disability that can be rated under AMA guidelines, she seeks a *de minis* scheduled injury award. In regards to the left knee, Ms. Suenishi is entitled to medical benefits.

As of October 28, 2002, through credible complaints of pain and medical evidence, Ms. Suenishi has invoked the Section 20 (a) presumption that her cumulative bilateral knee injuries were caused by her employment at the Navy Exchange. Again, the Employer has not rebutted the causation presumption. As a result, an award of medical benefits is appropriate for these cumulative injuries.

Essentially, Ms. Suenishi seeks medical benefits to help her cope with the continuing pain associated with the several injuries. Ms. Suenishi also requests attorney fees.

Employer[5]

Ms. Suenishi has worked part-time at the Navy Exchange on Pearl Harbor Navy Base for fifteen years. She has also worked full-time at a hospital for twenty-five years, mostly as a cook. Within the last few years, Ms. Suenishi has been a cook supervisor.

Ms. Suenishi injured her right knee twice on December 1, 1996 and August 20, 1997 when children pushed shopping carts into her knee. While she never filed disability compensation claims for those two injuries; the employer filed timely notices of injury. Although a claim for medical benefits is never time-barred, a claimant must nevertheless establish the claimed medical benefits are reasonable and necessary for the injury. Ms. Suenishi has failed to provide any evidence that medical benefits or treatment for her injuries on December 1, 1991 and August 20, 1997 are, or will be, necessary. She has furnished neither medical opinion establishing a need for treatment nor evidence of past related medical expenses. As a result, her claim for medical benefits for the two right knee injuries should be denied.

[5]TR, pages 12 to 15, 17, 18, and closing brief, dated August 29, 2003.

In November 2001, due to a construction project at the Navy Exchange, the Employer temporarily moved the employees' parking lot to a remote location and provided shuttle service between the temporary parking lot and the store for the employees. On November 10, 2001, Ms. Suenishi decided to park on a dirt road closer to the store rather than use the provided remote parking lot. Towards the end of her shift, Ms. Suenishi decided to move her car to the regular parking lot. When she attempted to enter her car, she slipped on the muddy road and twisted her left knee. After a couple of days off work at the Navy Exchange, Ms. Suenishi sought medical treatment for her knee. However, during this same period, Ms. Suenishi continued to work full-time at the hospital.

In order for the November 10, 2001 left knee injury to be compensable, it must have arisen out of and in the course of her employment with the Navy Exchange. Her injury must occur within the time and space boundaries of her employment and in the course of an activity whose purpose is related to her employment. On November 10, 2001, Ms. Suenishi voluntarily parked her car on a dirt road rather than the designated employee parking lot. She departed work without telling anyone about her action and her sole purpose in moving her car was personal convenience. As a result, Ms. Suenishi's left knee injury did not arise out of or in the course of her employment with the Navy Exchange and her claim for disability compensation and medical treatment must be denied.

In the event her left knee injury is considered to be work-related, Ms. Suenishi has failed to establish that she suffered any loss of earnings due to the injury. Additionally, since Dr. Walcyk has opined that Ms. Suenishi's left knee reached maximum medical improvement in April 2002 and Ms. Suenishi has continued to work, the nature and extent of her injury is permanent and partial. Any associated compensation is payable based on the Section 8 (c) schedule for partial loss of use of her left leg. However, Dr. Walcyk was unable to provide a specified disability rating and the Benefit Review Board has indicated that a *de minis* award for a scheduled injury is not available. For these reasons, Ms. Suenishi's compensation claim must be denied. The applicable average weekly wage for the November 10, 2001 injury is $261.84.

In October 2002, Ms. Suenishi claims she suffered cumulative injuries to both knees due to her assigned duties as a sales associate. By the fall of 2002, the Navy Exchange had hired other individuals to stock the shelves so that the sales associates could concentrate on customer service. However, Ms. Suenishi continued stocking because she preferred that task to customer service. The Navy Exchange gave Ms. Suenishi an opportunity to work a lighter duty job as a cashier. Ms. Suenishi declined the offer because she preferred working as a sales associate. When Ms. Suenishi was assigned tasks beyond her physical limitations, she never complained to her boss' supervisor or Human Resources. The appropriate weekly compensation rate for these injuries is the minimum of $242. 68.

As a cook at the hospital, Ms. Suenishi had to carry heavy items, which bothered her knees. Due to knee problems, she quit cooking and had to take the less demanding job as a supervisor even prior to her November 2001 left knee injury. Ms. Suenishi continues to experience knee pain but has not sought medical treatment partly because she is not interested in the treatments the physician would recommend.

In regards to the causation of the claimed cumulative injuries, Dr. Walcyk testified that she never examined the right knee and was unable to render an opinion as to whether it had suffered a cumulative injury. Dr. Walcyk believes Ms. Suenishi has suffered a work-related cumulative injury to her left knee. However, Dr. Walcyk rendered that opinion without reviewing Ms. Suenishi's job description and understanding the extent of her physical activities. As result, the physician acknowledged she was unable to provide a "scientific" opinion about causation. Since Dr. Walcyk has found the left knee to be medically stable, and Ms. Suenishi continues to work, the nature and extent of any left knee disability is permanent and partial. Again, Dr. Walcyk was unable to provide a rated disability for the left leg. Thus, the compensation claim must be denied. In regards to medical benefits for the left knee, no evidence of outstanding medical bills has been presented. Further, since Ms. Suenishi has indicated she is not interested in physicians' treatments, an award of medical benefits should not be granted.

SUMMARY OF EVIDENCE

While I have read and considered all the evidence presented, I will only summarize below the information potentially relevant in addressing the issues.

Ms. Betty Y. Suenishi

Deposition – April 9, 2003
(EX 9)

Ms. Suenishi has worked at the state of Hawaii long term patient care hospital at Malukia for 25 years. For the last 3 years, she has been a cook, level IV, which is a supervisory position. She works 40 hours a week but can set her own hours. The kitchen is open from 5:15 a.m. to 6:30 p.m. Typically, she works from 6:00 a.m. to 2:30 p.m., five days a week; Sunday and Wednesday are her days off. While she has a desk as a supervisor, Ms. Suenishi walks around 20 to 80 percent of the time to make sure things are being accomplished correctly. On occasion, she cooks too. Ms. Suenishi is a salaried worker and receives a biweekly paycheck. Her take home pay is about $900.

Ms. Suenishi also works as a sales clerk at the Navy Exchange located at Pearl Harbor in six hour shifts from 3:30 p.m. to 10:00 p.m., five days a week. Her principal duty is customer service. She also keeps the linen department tidy and occasionally has to stock shelves. Since moving into the new Navy Exchange store in October 2002, other employees were hired to do the stocking so that duty has become "rare." Other than breaks, Ms. Suenishi is standing and walking. Her job also requires some bending. On the six hour shift, employees get a 15 minute break and a half hour lunch.

The only earned income Ms. Suenishi has received since at least 1996 has been generated by her hospital and Navy Exchange work.

In June 1996, Ms. Suenishi fell down at work, possibly from a step ladder. She doesn't recall any other details.

In December 1996, a child pushed a shopping cart into her right knee. Again, she doesn't recall many details. Eventually, around July 1997, she had right knee surgery but it made her condition worse. The Navy Exchange paid her medical expenses and she missed about two weeks of work there. Ms. Suenishi also was out of work for three months at the hospital because they would not permit her return until she received clearance for her right knee. She was working as a cook then which required heavy lifting capability; there was no light duty available.

In August 1997, Ms. Suenishi was again struck in the right knee by a child-propelled shopping cart. She doesn't recall any other details, including medical treatment and time off.

On November 10, 2001, around 9:00 p.m., which was closing time, Ms. Suenishi went to move her car from a dirt road to the parking lot. Due to construction, the employees had lost their parking space. As a result, most employees parked on a dirt road near the parking lot. The store director had given the employees permission to move their cars into the parking lot about an hour before closing when the number of customers had diminished. Usually, Ms. Suenishi did not move her car. However, on this day, it had been raining. As she got into the car, she couldn't move her left leg. "I don't know if I slipped or not, but I may have slipped and stressed out the left knee" because her right knee had continued to cause her problems since the first shopping cart accident. Her right knee never got better. Eventually, Ms. Suenishi moved the car into the parking lot and then went in the store and sat down for a half an hour before she was able to complete her shift. She did not report the problem that night because she wanted to go home and try to "nurse" the left knee and see if it got better. She was concerned about the number of days that she had been missing from work because of her right knee. A few days later, Ms. Suenishi told her supervisor about the accident.

On September 14, 2002, Ms. Suenishi was assigned to count some t-shirts located on a shelf 20 feet above the floor. When she reminded the person about her climbing restriction, she was told to count "from down here." Then, according to Ms. Suenishi, "I don't know what happened." However, she climbed halfway up a ladder and was blocked by a pipe. With one leg on the ladder, she placed the other leg on the pipe and twisted her right knee. She also doesn't recall whether she lost any time due to the accident.

On October 28, 2002, Ms. Suenishi filed a claim for cumulative injuries to her knees due to her work at the Navy Exchange. The injuries were caused by all the bending, squatting, climbing and carrying heavy items, especially in the old days when she had to stock. Standing is not a problem. Likewise, walking is no problem if it's not on a slope or for a long time.

Physically, her present job as a cook supervisor does not bother her. However, the physical problems associated with her former job as cook required Ms. Suenishi to give up that work in the middle of 2000 and take the supervisor job. As a cook, both her knees had bothered her and especially when she was required to do heavy lifting. She doesn't like being a supervisor and would "rather" be cooking. Ms. Suenishi did not file a worker's compensation claim with the state of Hawaii because she didn't get hurt at the hospital.

While she continues to have knee problems, Ms. Suenishi is not presently receiving medical treatment for either knee. She doesn't go to physicians because they just prescribe pills.

The last time she received treatment for her left knee was in 2002. She had seen Dr. Walcyk but did not return for a follow-up appointment. When she twisted her right knee in September 2002, she didn't see a doctor. The physician who operated on her right knee indicated that if she continued to have problems, she might need a knee replacement. However, she is not interested in that procedure for either knee. Another doctor, Dr. Kahn, had recommended a series of injections for her right knee. She declined the injections because they would have involved too much time off work. She has also been to a chiropractor for her whole body. At present, that doctor does not treat her knees.

Prior to the first shopping cart accident, Ms. Suenishi had no problems with her right knee. After that accident, she began favoring her right knee, which caused problems in her left knee. She explained, "After I injured my right knee, it taxes your right side, the other side. . . I started getting on and off pain." She had left knee problems even before she twisted her knee on the muddy road.

Both of her knees are "junk." The right knee is worse than the left one. She doesn't intend to seek any medical attention for her knees now; but, she knows they will get worse as she ages. Both Dr. Walcyk and Dr. Kahn said she had the early stages of arthritis. Her present chief complaint is that she can't do as many of the activities that she used to like to do, such as aerobics and gardening. She can no longer wear nice shoes. The constant pain sometimes gets better and goes away for hours. The pain in both knees is in front of the knee cap. Her right knee is always swollen and clicks. It gives way once in while and locks up about once a month. The left knee doesn't lock up but does pop about twice a month and occasionally gives way. Because she is in constant pain, Ms. Suenishi has difficulty doing her best at work. The pain adversely affects her self-esteem. She uses an exercise bike at home which seems to help her knees some.

Hearing Testimony – May 16, 2003
(TR, pages 31 to 95)

[Direct examination] Ms. Suenishi has been employed at the Navy Exchange for 15 years as a sales clerk. She works about 30 hours a week and earns $250 for that period. Ms. Suenishi is not aware of her hourly rate.

Ms. Suenishi also works 40 hours a week at the Malukia Hospital as a dietary supervisor. She earns $15 an hour. Her job only requires her to sit and walk some. She has been working at the hospital for 25 years.

During the week of November 10, 2001, Ms. Suenishi worked 30 hours at the Navy Exchange and 40 hours at the hospital.

Prior to October 2002, Ms. Suenishi's work as a sales clerk included stocking merchandise in the linen department. She would take items from the storeroom and bring them out to the store shelves, a distance of about 200 feet. At times, in order to obtain the product, Ms. Suenishi would have to move, lift or carry boxes. Sometimes the boxes weighed more than 25 pounds. To place items on top shelves, Ms. Suenishi used a step stool. To reach the bottom

shelves, she had to squat, which is a difficult physical activity for her. When they moved into the new Navy Exchange in October 2002, the sales clerks were forced to do customer service and told not to stock. However, at times her supervisor will tell her to stock. As a result, Ms. Suenishi believes stocking remains part of her job as a sales clerk. During her work day, Ms. Suenishi gets a 15 minute break and 30 minutes for lunch.

During her employment at the Navy Exchange, Ms. Suenishi has suffered many knee injuries and she does not remember the individual circumstances very well. At some point in 2002, she "must have twisted" her knee while climbing a ladder and reaching for some inventory on the top shelf in the store room. Because a pipe rack holding clothes blocked her halfway up the ladder, Ms. Suenishi had to reach with only one leg on the ladder. Ms. Suenishi had told her supervisor the situation was unsafe but her supervisor replied, "that's the order." Ms. Suenishi finished work and then went home and iced her knee. She doesn't recall if she saw a doctor or missed any work.

In November 2001, the employee parking space was moved from the regular parking lot next to the Navy Exchange to a temporary parking lot far away. Although the parking lots and the Navy Exchange were not actually located on the Navy base, Ms. Suenishi believes the facilities were nevertheless on federal property. Because the temporary parking lot was so far away, most employees parked on a dirt road that was next to the regular parking lot. After the store closed, the employees could move their cars back to the regular parking lot. One night, after it had been raining and the store closed, Ms. Suenishi went to move her car to the regular parking lot. At that time, she had about another hour of work to complete. Ms. Suenishi doesn't recall exactly what happened; she believes she slipped on the muddy road while trying to get into the car. After she was in the car, she couldn't move her left leg due to pain in her knee. Eventually, she drove her car into the regular parking lot and returned to work. Because her left knee was still hurting, she sat down on a counter for about half an hour. Since no one was around, she didn't tell anyone about her problem. Ms. Suenishi then worked a little while longer and went home.

A couple of days later, she saw Dr. Walcyk in the industrial health department of Kaiser Hospital about her left knee pain. When she arrived at the hospital with her complaint, she was assigned to Dr. Walcyk. The doctor prescribed pain killers but Ms. Suenishi didn't take much of it because she doesn't like medicine. She'd "rather have the pain." The doctor said she could go back to work but with some physical restrictions, which included no squatting, kneeling, or climbing ladders. She did not have any restrictions in regards to standing or walking.

Due to her knee problem, she was in no condition to return to work at the Navy Exchange. However, Ms. Suenishi was able to go to her other job at the hospital. She does not remember how many days she missed at the Navy Exchange; it may have been just a few days.

Ms. Suenishi has continued to see Dr. Walcyk. Because she favored her knee, "both knees started to hurt" and the condition "slowly got worse." She has continued to work at the Navy Exchange with knee pain. With written slips, she informed her supervisor of her work restrictions. However, she continued to receive work assignments that caused her to climb and squat. When she reminded her supervisors of the restrictions, they would say "Oh, yeah. That's

right" and change the assignment. Or, the supervisors would tell her to do the assignment without squatting or climbing. Ms. Suenishi didn't know how she was supposed to accomplish the assignments without climbing or squatting. She doesn't recall a supervisor observing her squat or climb. But, she believes they must have known since they gave her tasks, like clean the shelves, that required either squatting or climbing and she got the job done.

Years earlier, when her right knee was injured by a shopping cart, Ms. Suenishi was treated by a surgeon and Dr. Kahn, who gave her injections. After the shots, Dr. Kahn would tell her to go home and rest. But she went to work because her supervisor was concerned about how much time she was missing.

Occasionally, she decides to take time off due to her knee pain because she knows rest and ice will help. Since her knees have continued to bother her, Ms. Suenishi believes she has taken time off from the Navy Exchange in the last year. Sometimes, she takes time off without going to a doctor. She doesn't remember the last time she took off but she has done it between 10 and 20 times.

Most of the time, her left knee hurts and is weak; sometimes it swells. On a scale of 0 to 10, her pain is at 4 most of the time. On other occasions, her left knee locks and pops. When the knee locks up, it's very painful. Her knee locked up within the last couple of weeks. She didn't go to a doctor then because "they're just going to give you pain killers." She doesn't like medication because it makes her dizzy and upsets her stomach. She is not sure the pain killer would help her. Ms. Suenishi prefers to get better "other ways," by herself. Although her condition is getting worse, she's still trying.

After November 21, 2001, she received notice that the Navy Exchange would not provide medical treatment. As a result, she stopped seeing the doctor after a visit or two because she couldn't afford the costs. Ms. Suenishi doesn't believe that she has seen a doctor in 2003. Since that accident, her left knee's symptoms have worsened. When the pain gets real bad, she sits down and that helps. After a full day of work, her knee hurts more; sometimes she ices her knees.

Ms. Suenishi's right knee pain is about the same as the left knee. The most pain is level "12." Dr. Yee performed surgery on her right knee in 1997. However, rather than making it better, the operation made her knee worse. Dr. Yee said she needed knee replacements. Ms. Suenishi is not interested in the procedure.

Due to the condition of her knees, Ms. Suenishi can no longer do aerobics. She is gaining weight and can not get around as much as she used to. Ms. Suenishi enjoyed cooking for the residents of the geriatric hospital. She can't do that work anymore because of the heavy lifting requirement.

[Cross examination] Ms. Suenishi can't remember whether she took any days off from the Navy Exchange due to the November 10, 2001 accident. Likewise, she doesn't remember whether a doctor took her off work. When she left the store to move her car, Ms. Suenishi does not recall whether she told anyone.

The temporary employee parking lot was paved and a shuttle to and from the lot was provided. When asked whether she voluntarily chose to park on the dirt road, Ms. Suenishi stated, "Yes. . . But we were told to park there, too, on the dirt road."

After the supervisor learned that she was on light duty, they moved her to a cashier position for several days. However, she believes they assigned her the cashier work because they knew she didn't want to work in that position. She didn't like being a cashier; she preferred the sales clerk position. After a few days, she returned to being a sales clerk.

At the Navy Exchange, her supervisor told Ms. Suenishi that she is too blunt with customers. At the same time, she got good comments for getting her job done. The one duty she didn't like was customer service.

Ms. Suenishi informed Dr. Walcyk that the Navy Exchange was requiring her to work beyond the work limitations. She doesn't remember the physician's response. When Ms. Suenishi reminded her supervisors of her work limitations, they would tell her to "do it another way. . .just as long as it's done." Sometimes, the supervisors would tell her not to do the assignment. She has not complained to her supervisor's supervisor. She did not contact Human Resources about the assignments.

The new Navy Exchange building was completed in October 2002. In the new facility, certain individuals are assigned as stockers. The supervisors stress customer service rather than stocking to the sales clerks. She continues to stock everyday. If she wasn't stocking, then Ms. Suenishi would have to work at customer service, which she doesn't like.

She declined the Navy Exchange's offer of an early retirement.[6]

When she started working at the hospital, Ms. Suenishi was a pot washer. Within a year or two, she worked her way up to being a cook. She held that job for over 20 years. As cook, Ms. Suenishi had to carry heavy items and that activity hurt both knees. About three to four years ago, Ms. Suenishi moved to a supervisory position because of her knee problems. Ms. Suenishi did not file a workers' compensation claim against the state of Hawaii, which runs the hospital. For a while, she was able to continue as a cook by having the "lower level" guys move the heavy items.

Although Dr. Walcyk was treating the left knee, Ms. Suenishi believes she told the physician about her problems with the right knee. She doesn't recall whether she told the doctor about the locking of, and the popping in, her left knee. She hasn't seen Dr. Walcyk since sometime last year. While the Navy Exchange declined medical benefits, Ms. Suenishi acknowledged that Kaiser Hospital did not tell her not to return. Part of the reason she hasn't returned to the doctor is that she doesn't want the recommended treatment of pain killers, surgery, or injections. At present, her knee condition gets better sometimes and gets worse sometimes.

[6]Ms. Suenishi's declined the offer in March 2003. *See* EX 8

[ALJ examination] Ms. Suenishi's work as a cook only started becoming a problem for her knee after she injured the knee "five, six years ago." After work as a cook, she sometimes had to ice her knees. Because of the knee problem, she took the supervisor job when it opened. She couldn't lift heavy items on her own and felt bad having other people do her work. As a supervisor, she makes sure the other people are doing their jobs. The job involves mostly sitting at a desk in the kitchen, with some walking around. Her supervisory work does not bother her knees. She does not have to ice her knees after coming home from the hospital job.

Wage and Tax Statements and Biweekly Earnings Statement
(CX 1)

Ms. Suenishi's Wage and Tax Statements, W-2s, indicate that she earned the following taxable income: 1997 -- $14,335.00; 1998 -- $15,256.62; 1999 -- $15,682.55; 2000 -- $14,015.80; 2001 -- $12,794.84; and, 2002 -- $13,367.57.

The Navy Exchange year-to-date summary for 2002 indicates that Ms. Suenishi earns a 7.5% pay differential for the portion of her hours that occur in the second shift.

The biweekly earnings statement for the period of November 7, 2001 to November 20, 2001 indicates the following categories of hours, hours worked, and wages.

Regular	14.40 hours	$133.63
Leave	5.55	51.50
Sick	23.45	217.62
Holiday	6.00	55.68
SFT2 7.5	33.40	23.25
		$481.68

Chiropractic Treatment Notes
(CX 2)

On November 1, 1999, Ms. Suenishi, then 55 years old, started receiving periodic chiropractic treatments. Upon the initial evaluation, she listed her occupation as food services. Ms. Suenishi presented multiple complaints relating to her back and neck. She also indicated that she experienced numbness and tingling in her legs. These various health concerns restricted her daily activities. In her accident history, Ms. Suenishi reported that she had injured her right knee twice in 1996 and 1997 when she was struck by a grocery cart and fell to the floor. In 1997, she had right knee surgery. Ms. Suenishi's treatments continued through April 2002. The treatment calendar contains no entries for November 2001.

Dr. Patricia J. Walcyk

Treatment Notes – December 2001 to March 2002
(CX 2)

On December 7, 2001, Dr. Walcyk ordered physical therapy for Ms. Suenishi's left knee that was injured on November 10, 2001. On December 26 and 28, 2001, and January 2, 2002, Ms. Suenishi received physical therapy treatments for her left knee. On the last visit, she reported increased left knee pain during the prior weekend.

On February 15, 2002, Dr. Walcyk conducted an interim examination of Ms. Suenishi's left knee that was injured on November 10, 2001. At that time, she reported that her knee was feeling pretty good. With some walking and carrying, Ms. Suenishi would experience "aggravation of discomfort." Upon prolonged periods of walking and carrying, her left knee would hurt. No locking or giving way was reported. Ms. Suenishi was presently in light duty status with the Navy Exchange. Upon physical examination, Dr. Walcyk found full extension and flexion in the left knee. She observed no indication of medial or lateral joint line pain. A recent MRI had established "mild" degenerative change in the left knee. Dr. Walcyk diagnosed left knee strain. She suggested injections for relief but Ms. Suenishi declined. Other recommended modalities included acupuncture and quadriceps strengthening exercises.

On March 18, 2002, Dr. Walcyk conducted a follow-up examination for Ms. Suenishi's left knee effusion and strain. Dr. Walcyk continued Ms. Suenishi on limited duty status. Some of the constraints included no ladder climbing with weight greater than five pounds. She could only occasionally bend, squat, or kneel. The physician did not place any restrictions on walking or standing. Dr. Walcyk recommended a functional capacity evaluation.

Deposition – May 13, 2003[7]
(CX 3)

Dr. Walcyk, board certified in occupational and preventive medicine, is a doctor of osteopathy. Other than surgery, she is qualified to treat orthopedic problems. She has conducted some research into cumulative trauma injuries. Cumulative trauma injury is defined as repetitive motions, awkward positions, or force repetition that produces subjective pain and sometimes objective findings.

Dr. Walcyk first saw Ms. Suenishi on November 17, 2001 when she presented with left knee pain. According to Ms. Suenishi, as she was getting into her car that was parked on a muddy road, with her right leg already inside, she bent and twisted her left leg and developed sharp pain in her left knee. Upon physical examination, Dr. Walcyk found effusion, or fluid, in the left knee. Ms. Suenishi was unable to crouch and duck walk, which is indicative of a possible derangement of the meniscus. The physician diagnosed left knee effusion and intended to rule out meniscus damage and degenerative changes in the left knee. Dr. Walcyk estimated

[7]In the deposition, Dr. Walcyk referenced some computer print-outs containing medical record information. Mr. Birnbaum expressed an intention to obtain those records. I note no such records were attached to CX 3.

the severity of the condition to be medium. Upon a quick review of Ms. Suenishi's medical record, Dr. Walcyk did not see any left knee problems prior to the 2001 accident.

At that time, the physician only knew that Ms. Suenishi was a sales clerk; no job description was available. Dr. Walcyk imposed a light duty work restriction. She didn't recall the specific provisions but believes the restrictions included no squatting, crawling or crouching. Lifting would be limited to 25 pounds. Climbing ladders and prolonged standing may have been limited too. If an employer could not have complied with those limitations, then Ms. Suenishi would be in off duty status. Dr. Walcyk doesn't know whether the employer in Ms. Suenishi's case was able to accommodate her. A week off from work would not have been unreasonable. At the completion of the examination, Dr Walcyk prescribed ice, anti-inflammatory medication and a left knee x-ray.

Ms. Suenishi returned four days later. A subsequent x-ray disclosed medium to moderate degenerative changes in the left knee, with narrowing of the medial joint line. The doctor believed the condition to be medium severe. However, a February 2002 MRI only showed degenerative changes in the medial meniscus. At that time, Ms. Suenishi remained symptomatic. She continued to have effusion in her knee and was again unable to squat. For a period of time, around mid-February 2002, when Ms. Suenishi reported feeling better, Dr. Walcyk returned her to full duty. However, Ms. Suenishi returned on March 18, 2002 she had been having difficulty squatting. She also experienced aggravation of pain when kneeling on the left knee. So, Dr. Walcyk returned Ms. Suenishi to light duty. Her activities were limited to occasional bending, kneeling, and climbing; she could not carry more than five pounds up a ladder. Dr. Walcyk requested a functional capacity evaluation, which was denied.

Absent Ms. Suenishi's job description with its specific physical tasks, Dr. Walcyk was not capable of providing a "scientific" answer on whether she had suffered a cumulative injury. However, repeated squatting and climbing up and down ladders would "aggravate" the type of condition Ms. Suenishi has in her left knee, which is degenerative arthritis. Degenerative arthritis involves the wearing away of the knee joint cartilage. That cartilage loss causes swelling, produces fluid build-up, and places additional stress on the supporting ligaments. A person with this condition can be more susceptible to cumulative injury. Ms. Suenishi's condition is "progressive."

Dr. Walcyk last saw Ms. Suenishi in September 2002; consequently, she is not aware of the current condition of the left knee. In her treatment of Ms. Suenishi, Dr. Walcyk did not annotate any problems with the right knee. She believes the left knee injury was related to the November 10, 2001 work place accident.

The hospital treatment records indicate that Dr. Marzoff saw Ms. Suenishi on October 3, 2002 while he was covering for Dr. Walcyk. He diagnosed osteoarthritis of the right knee aggravated by work and imposed light duty restrictions due to the right knee problem. Dr. Zane, a rheumatologist also examined Ms. Suenishi's knees and diagnosed bilateral degenerative arthritis, obesity and mild osteoarthritis. He recommended that Ms. Suenishi avoid kneeling, climbing, and squatting.

Ms. Suenishi's medical history indicates that she previously had problems with her right knee that led to arthroscopic surgery for a meniscus repair several years ago. She was not happy with the results which helps explain why she didn't want invasive treatments for her left knee problem.

Dr. Walcyk notes the hospital record indicates Ms. Suenishi has experienced right knee pain. However, Dr. Walcyk did not recall examining the right knee and can't say whether it has been aggravated. At the same time, degenerative arthritis is a bilateral disease. In regards to the left knee, she believes Ms. Suenishi has suffered repeated aggravation and continuing symptoms.

Although other treatment modalities are available and possible for her left knee condition, such as arthroscopic exploration and injections, Ms Suenishi had expressed no interest in such procedures. Consequently, Dr. Walcyk believes Ms. Suenishi has achieved "medical stability" and her job restrictions are permanent. Because the left knee has remained symptomatic, Dr. Walcyk would now restrict Ms. Suenishi from any ladder climbing. She should engage in only occasional climbing, bending, and kneeling. Standing and walking are limited to her tolerance. Since that tolerance may vary, Dr. Walcyk would initially limit standing to half a work day. The only specific standing and walking restriction was imposed on November 30, 2001; Ms. Suenishi was not to stand or walk for more than one hour at a time.

Dr. Walcyk believes Ms. Suenishi should be provided medical benefits in the future; the option to choose additional treatment should remain open. Due to persistent effusion in the left knee, the physician believes a permanent impairment exists; however, she has not rated it. The loss of cartilage due to degenerative arthritis may be a basis for a disability rating. The specific MRI interpretation of the February 11, 2002 MRI was degenerative arthritis with partial loss of the medial meniscus.

When Ms. Suenishi returned on February 15, 2002, she was feeling better and had full range of motion. As a result, Dr. Walcyk returned her to full duty status. However, on March 18, 2002, kneeling was causing her problems again and her pain symptoms had returned. Her subjective and objective symptoms come and go. On April 11, 2002, Dr. Walcyk concluded that Ms. Suenishi had reached medical stability because the doctor didn't think she would "improve any better." Again, she did not attempt a disability rating at that time.

Dr. Walcyk doesn't know how many hours a day Ms. Suenishi bends or squats at work. She believes Ms. Suenishi has been doing light duty. At the same time, the physician doesn't really know if she is able to do her regular duties and stay within the work restrictions.

When Ms. Suenishi presented on November 17, 2001, Dr. Walcyk partially evaluated the right knee when she determined Ms. Suenishi was unable to squat and duck walk on <u>both</u> knees. However, because she was being evaluated for a workers' compensation left knee injury, Dr. Walcyk only focused on the left knee. She provided no treatment or analysis for the right knee. Her diagnosis for the left knee injury of November 10, 2001 was aggravation of degenerative arthritis. Dr. Walcyk never applied the term "cumulative injury."

Ms. Suenishi has an obesity problem and that condition can progress degenerative arthritis.

Dr. Walcyk would interpret persistent pain complaints as evidence that something is not getting better. Reports of the knee popping and clicking are significant. However, when asked by Dr. Walcyk whether she had experienced such symptoms, Ms. Suenishi said no. If Ms. Suenishi has started experiencing those problems, she needs to be reevaluated.

Employment Record

December 1, 1996 Injury
(EX 1)

A December 4, 1996 First Report of Injury filed by the Employer indicated that on December 1, 1996, Ms. Suenishi reported to her supervisor that a child had pushed a shopping cart into her right side. She suffered contusions to the right knee and ankle and stopped work for the day. The Employer authorized medical care.

Between April 2, 1997 and April 20, 1997, the Employer paid temporary total disability to Ms. Suenishi at a weekly compensation rate of $200.27 based on an average weekly wage of $256.51. Ms. Suenishi was able to return to work on April 21, 1997.

August 20, 1997 Injury
(EX 2)

Another First Notice of Injury, dated September 17, 1997, reports that in the afternoon of August 20, 1997, Ms. Suenishi stated that a child had pushed a shopping cart into the back of her legs. She experienced pain in her left and right ankles.

November 10, 2001 Injury
(EX 3, EX 6, and EX 7)

On March 6, 2002, the Employer filed a first notice of injury indicating that on November 10, 2001, Ms. Suenishi notified her supervisor that she had twisted her left knee while moving her car when she slipped on a muddy road. The report indicates Ms. Suenishi did not stop work on that day. However, she missed work between November 11, 2001 and November 30, 2001. The Employer authorized medical treatment.

On March 14, 2002, The Employer filed a Notice of Controversion contesting Ms. Suenishi's entitlement to benefits based on the issue of course and scope of her employment at the time of the injury.

On April 17, 2002, Ms. Suenishi filed a disability compensation claim for her left knee injury on November 10, 2001. According to Ms. Suenishi, the Store Director permitted employees to move their cars to the regular Navy Exchange parking lot if business was slow during the last hour of operation. A downpour had occurred earlier in the day. On her break, she

went to move her car that was parked on a dirt road next to the regular parking lot. As she was getting into the car, she slipped on the muddy road and twisted her left knee. On July 10, 2002, Ms. Suenishi added that her weekly wage varied from $150 to $200, depending on her hours, which ran from 23 to 34 hours.

Based on Ms. Suenishi's gross biweekly payroll totals for the year preceding November 10, 2001, the Employer determined her average weekly wage was $271.00 and the corresponding compensation rate was $241.52.

September 14, 2002 Injury
(EX 4)

A September 18, 2002 First Report of Injury, stated that on September 14, 2002, Ms. Suenishi twisted her right knee climbing up and down ladders pulling boxes from the top shelf in the storeroom. No work time was lost. The Employer authorized medical treatment.

October 28, 2002 Cumulative Injury
(EX 5)

On November 6, 2002, Ms. Suenishi filed a disability compensation claim for cumulative injury to both knees as of October 28, 2002.

On March 11, 2003, the Employer controverted Ms. Suenishi's claim for cumulative injury due to the lack of medical evidence.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

Stipulations of Fact

The parties have stipulated to the following facts (TR, pages 18 to 21): Between December 1996 and October 2002, and continuing, an employer – employee relationship existed between the parties. On December 1, 1996, Ms. Suenishi suffered a right knee injury during the course of and arising out of her employment with the Employer. On August 29, 1997, Ms. Suenishi suffered a right knee injury during the course of and arising out of her employment with the Employer.

Issue No. 1 - Medical Benefits

A. December 1, 1996 Injury

As the parties stipulated and the evidence demonstrates, Ms. Suenishi suffered an injury to her right knee on December 1, 1996 when it was struck by a shopping cart. In her present claim, she seeks medical benefits associated with that injury. The Employer objects because Ms. Suenishi has not a) provided any evidence of past medical expenses, or b) established that treatment is reasonable and necessary now or in the future.

Under Section 7 (a) of the Act, 33 U.S.C. § 907 (a), if an employer is found liable for the payment of disability compensation, then the employer is also responsible for those reasonable and necessary medical expenses incurred as a result of a work-related injury to the extent the injury may require. *Perez v. Sea-Land Services, Inc.*, 8 BRBS 130 (1978). The employer's responsibility is continuing and exists even if a claim for disability compensation is time-barred by Section 12 and Section 13 of the Act,[8] *Strachen Shipping co. v. Hollis,* 460 F.2d 1108 (5th Cir.) *cert. denied,* 409 U.S. 887 (1972), or fails to satisfy the Section 8 requirements for disability compensation, *Ingalls Shipbuilding v. Director, OWCP,* 991 F.2d 163, 166 (5ht Cir. 1993). In other words, entitlement to medical services is never time-barred where a disability is related to a compensable injury. *Colburn v. General Dynamics Corp.*, 21 BRBS 219 (1988). Under this section, a claimant is entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for her work-related injury. *Tough v. General Dynamics Corp.,* 22 BRBS 356 (1989). At the same time, an employee may not receive an award of medical benefits absent evidence of medical expenses incurred in the past or treatment necessary in the future. *Ingalls,* 991 F.2d at 166. The claimant carries the burden to establish the necessity of medical treatment for, and that medical expenses are related to, a compensable injury. *See generally Schoen v. U.S. Chamber of Commerce,* 30 BRBS 112 (1996) and *Pardee v. Army & Air Force Exchange Service,* 13 BRBS 1130 (1981).

As a preliminary matter, I found Ms. Suenishi to be a generally credible witness who did not hesitate to state when she was not certain about important facts. As a result, I believe her testimony that prior to the first shopping cart accident she did not have any problems with her right knee. Her testimony also establishes that she has experienced, persistent, though varying pain in, and difficulties with, her right knee since the December 1996 accident and subsequent knee surgery.

Next, I turn to consideration of past medical benefits. As the employer correctly noted, Ms. Suenishi has not presented any evidence to support a claim for past medical expenses related to the December 1, 1996 right knee injury. According to Ms. Suenishi, the Employer paid for the cost of the right knee surgery in 1997.

In regards to present and future medical benefits, three aspects of her claim preclude an award of such benefits at this time.

First, and fundamentally, Ms. Suenishi is actually not seeking any medical benefits at this time. According to her testimony, Ms. Suenishi is not presently being treated by a physician for knee problems. Likewise, the chiropractic care she presently receives does not involve treatment of her knees. Further, as discussed below, Ms. Suenishi has declined to participate in several medical treatment options ranging from physician follow-up appointments to medication to invasive procedures. Although the absence of ardor in her claim does not preclude an award of necessary medical benefits, her attitude helps explain the sparse, and insufficient, evidentiary record that has been presented to support her medical benefits claim.

[8]In part, Section 12 (a) of the Act, 33 U.S.C. § 912 (a) requires that a claimant provide notice of a work-related injury within 30 days of the date of injury. According to Section 13 (a), 33 U.S.C. § 913 (a), a claim for disability compensation will be barred unless it is filed within one year after the injury

Second, Ms. Suenishi has failed to specify what treatment she believes is necessary due to her December 1, 1996 right knee injury. The record contains several medical treatment possibilities for her bad knee. When the right knee surgery did not produce the desired results, the surgeon indicated knee replacement might be the next option. When Dr. Kahn evaluated her knees, she suggested that a series of injections might be helpful. Dr. Walcyk, the doctor most apt to be considered a treating physician, initially prescribed medication but discontinued that therapy due to Ms. Suenishi's inclination not to take the medicine. As an alternative, Dr. Walcyk has suggested injections or acupuncture. Ms. Suenishi has declined any injection therapy and apparently has not pursued acupuncture. As a result, while evidence of several treatment modalities has been presented, Ms. Suenishi has not specifically included any of these recommendations in her medical benefits claim.

Third, and closely related, due to Ms. Suenishi's rejection of possible therapies for her right knee, the record contains insufficient evidence from the medical authorities on how the treatments actually relate to and are necessary for her right knee injury of December 1, 1996. The evidentiary record contains little probative explanation from the medical authorities that would establish the necessity any of the suggested approaches.

In her deposition, Ms. Suenishi succinctly summarized her position of medical benefits: she is presently not seeking medical benefits; intends to take care of herself; but knows that her knees will worsen with age. The insufficient nature of the evidentiary record reflects that position. For the reasons noted above, I find Ms. Suenishi has failed to met her burden of proof in establishing that medical benefits for her December 1, 1996 right knee injury are appropriate at this time. Accordingly, her claim for such benefits must be denied.[9]

B. August 20, 1997

Ms. Suenishi also seeks medical benefits due another shopping cart accident involving her right knee which occurred on August 20, 1997. The Employer again contests the entitlement to medical benefits.

For the same reasons identified above, the present evidentiary record is insufficient to support Ms. Suenishi's claim for medical benefits for the work-related August 20, 1997 right knee injury. Consequently, her medical benefits claim for this injury must also be denied.

Issue No. 2 – Left Knee Injury, November 10, 2001

Ms. Suenishi seeks disability compensation and medical benefits for the injury to her left knee that she suffered on November 10, 2001. The Employer contests these entitlements because the injury did not occur during the course of her employment. Additionally, to the extent the injury is work-related, Ms. Suenishi has failed to establish the amount of time she was

[9]As her deteriorating knee situation continues to develop, Ms. Suenishi may be entitled to medical benefits to the extent that any of her work-related injuries have caused, contributed to, or combined with the degenerative arthritis in her knees. The present denial of her medical benefits claim does not preclude another medical benefits claim in the future.

out of work due to the injury and the extent of any resulting permanent disability. Likewise, as with her other injuries, the record is insufficient to establish entitlement to medical benefits.

A. Course of Employment

Ms. Suenishi asserts her November 10, 2001 left knee injury arose out of and in the course of her employment with the Navy Exchange. During her work hours, Ms. Suenishi twisted her left knee when she moved her car from a dirt road adjacent to the Navy Exchange regular parking lot into the regular parking lot. The Employer maintains Ms. Suenishi's accident did not occur within the course of her employment. Ms. Suenishi's action was solely for her personal benefit; she abandoned her job without permission, and the accident occurred off the premises of the Navy Exchange.

To be compensable under the Act, Section 2 (2) requires that an injury arise out of and in the course of a claimant's employment. This course of employment requirement refers to the time and place (or space) of employment as well as the activity the employee was engaged in at the time of the injury. *Wilson v. Washington Metro Area Transit Auth.,* 16 BRBS 73, 75 (1984). Absent substantial evidence to the contrary, the assumption provided in Section 20 (a) of the Act that a claim comes within its coverage applies to the issue of whether an injury arises in the course of employment. *Id.* The activity-employment relationship must be a substantially contributing factor though it need not be the sole or proximate cause. *Cudahy Packing Co. v. Paramore,* 263 U.S. 418, 423-24 (1923). The place/space criteria is not absolute if the employee's purpose is clearly tied to her employment. *Preskey v. Cargill, Inc.,* 667 F.2d 1031 (9th Cir. 1981) (injury suffered by employee when picking up his pay check at the union hall was compensable). Likewise, if an injury occurs on the employer's premises, and the activity did not place the employee in the path of any new risk not already inherent in her employment, the unauthorized and personal character of the activity's purpose loses significance. *Durrah v. Washington Metro Area Trans. Auth.,* 760 F.2d 322, 324 (D.C. Cir. 1985) (employee suffered a compensable injury at employer-provided soda machine on the business premises after leaving his post without permission). At the same time, if the unauthorized personal mission represents "personal frolic" and has no benefit to the Employer, then an injury suffered during that activity may not be compensable. *Compton v. Avondale Industries, Inc.,* 33 BRBS 174 (1989) (employee's injury suffered after leaving work station to smoke marijuana in remote areas of the premises was not compensable.)

Since Ms. Suenishi's claim involves employee parking, an examination of several cases concerning the nature of parking lots is also helpful.[10] As a general principle, the employer's business premises will include an employee parking lot over which the employer exercises significant control, even if it does not actually own the property. *Shivers v. Navy Exchange,* 144 F.3d 322, 325 (4th Cir. 1998). Such authority may be demonstrated if the Employer

[10]These cases arose during litigation involving the "coming and going" rule. Generally, according to the "coming and going" rule, an injury an employee suffers on her way to and from work is not covered under Section 2 (2) of the Act. *Perkins v. Marine Terminals,* 673 F.2d 1097, 1102 (9th Cir. 1982). However, once the employee reaches, or remains on, an employer's premises, depending on the circumstances, an injury occurring before or after work hours may still be compensable. *Durrah,* 769 F.2d at 324. Thus, the "coming and going" rule is invoked at the threshold of an employer's premises. Defining this critical legal boundary of an employer's business generated the litigation on the nature of parking lots.

affirmatively designates an employee parking area, enforces parking rules in the lot, provides upkeep and day-to-day housekeeping maintenance of the area, dictates the means and manner by which its employees arrive and leave their work locations, and exercises sufficient control over a portion of an employee's journey in the area to create a risk of employment not shared by the public. *Id at page 325 and footnote, Cantrell v. Base Restaurant Wright-Patterson Air Force Base,* 22 BRBS 372 (1989), *Trimble v. Army and Air Force Exchange Service,* 32 BRBS 239 (1998), and *Sharib v. Navy Exchange Service,* 32 BRBS 281 (1998). Correspondingly, if the employer lacks control over, or responsibility for, the condition of the area surrounding its building, that area, which may include a parking lot used by its employees, is not part of the business' premises. *Harris v. England Air Force Base Nonappropriated Fund Fin. Management Branch,* 23 BRBS 175 (1990).

With these principles in mind, I next move to specific findings concerning Ms. Suenishi's November 10, 2001 left knee injury. As an initial step, I must make one probative value assessment. In her hearing testimony, after acknowledging that she voluntarily decided to park on the dirt road, Ms. Suenishi added that employees were told to park on the dirt road. As previously stated, I found Ms. Suenishi to be a generally credible witness who candidly acknowledged lapses of memory about important details. Her testimony in regards to the dirt road reflects such a lapse. Significantly missing in her testimony is the identification of the person who told the employees to park on the dirt road. The absence of such detail is significant because circumstantial evidence in this case demonstrates that the Navy Exchange took the effort to provide a paved temporary parking lot for its employees and shuttle service. Directing its employees to also park on the dirt road seems inconsistent with the establishment of a designated temporary parking lot. In regard to other aspects of the parking lot issue, Ms. Suenishi did recall that the store director had authorized the return of employee vehicles to the regular parking lot during the last hour of business. She did not provide the same detail in regards to the purported instruction to park on the dirt road. Further, I note that in her April 2002 compensation claim and April 2003 deposition, Ms. Suenishi did not include an assertion that the dirt road was an authorized parking area. Consequently, I consider her statement insufficiently probative to establish that the Navy Exchange directed its employees to park on the dirt road.

Having addressed the one probative issue concerning the accident of November 21, 2001, I make the following specific findings. In November 2001, due to construction, the Navy Exchange employees, including Ms. Suenishi, were no longer permitted to park in the regular parking lot next to the store. A store supervisor approved one exception to the regular parking lot restriction; during the last hour the Navy Exchange was open, the employees were permitted to move their cars and park in the regular parking lot. Due to the loss of the regular parking lot for employees, the Navy Exchange provided and designated a temporary, paved parking lot for its employees. Since the temporary employee parking lot was located some distance away from the store premises, the Employer provided transportation between the parking facility and the store. Rather than use the temporary parking lot, many employees parked their vehicles on a dirt road next to the store's regular parking lot. On November 10, 2001, at the beginning of her work shift around 3:30 p.m., Ms. Suenishi parked her car on the dirt road. Sometime during the day, the road became muddy due to rain. Around closing time, 9:00 p.m., Ms. Suenishi left her work area without advising anyone and went to her car on the dirt road. She wanted to move the car

so it would be closer when she got off work about an hour later. Entering the car, Ms. Suenishi slipped and twisted her left knee. Then, she drove her car into the regular parking lot.

Considering these facts, I believe substantial evidence exists to rebut the Section 20 (a) presumption that Ms. Suenishi's left knee injury occurred within the scope of her employment on November 10, 2001. Clearly, Ms. Suenishi suffered the injury during her regularly scheduled hours with the Navy Exchange. At the same time, two other requisite elements, an employer-benefiting activity and the occurrence of the injury within the place of her employment, are missing. If Ms. Suenishi had been engaged in the Employer's business at the time of the injury, then compensation might be appropriate. However, when Ms. Suenishi departed the store to move her car, she was engaged in a personal mission. She decided to move her car closer to the store solely for personal reasons. The store supervisor's permission to use the regular parking lot during the last hour of business certainly did not equate to a mandate by the Employer that the employees must move their cars into the lot. The store director's permission concerned only the use of the regular lot for employee parking; it did not provide a sufficient business purpose connection with the movement of employees' cars into to the area.

More significant, Ms. Suenishi was not injured on the Employer's premises. None of the circumstances surrounding the accident warrant a finding that the dirt road was part of the Navy Exchange facilities. Although the dirt road was next to the regular parking lot, the Navy Exchange did not exercise any control over, or have responsibility for, the dirt road. Instead, the Employer had provided a paved temporary parking lot for its employees, with shuttle transportation. This consideration is particularly important because the most likely cause of Ms. Suenishi's twisted left knee was the muddy condition of the dirt road. Rather than use the temporary parking facility, Ms. Suenishi chose to park on the dirt road. In making that choice, she exposed herself to an additional risk, mud, that was not already inherent in her employment with the Navy Exchange. Had Ms. Suenishi utilized the paved temporary parking lot provided by the Employer, she would not have been exposed to the potential of slipping in mud while getting into her car. I recognize that many Navy Exchange employees apparently also parked on the dirt road and the Employer permitted employee parking in the regular lot adjacent to the dirt road during the last hour of day. However, since that permission to use the regular parking extended to all employees wherever they parked the cars, including the temporary parking lot, that supervisor's action did not amount to the Employer's condoning or directing the practice of its employees parking on the dirt road. The record contains insufficient evidence to conclude the Employer condoned, encouraged, permitted or required its employees to park on the dirt road. Consequently, because Ms. Suenishi was not injured within the space of her employment, I find her November 10, 2001 left knee injury did not occur in the course of employment with the Navy Exchange. As a result, she did not suffer an injury compensable under the Act.[11]

[11]Since Ms. Suenishi did not suffer a compensable injury on November 10, 2001, I need not address the nature and extent of any disability related to that injury. At the same, for the parties' benefit, I have two additional observations about Ms. Suenishi's injury. First, had her injury been covered under the Act, determination of the extent of such disability would have been problematic. Ms. Suenishi claims she may have missed a week's work due to the injury and taken a combination of sick, holiday, and regular leave up to about 26 hours to cover her absence. However, both in her deposition and hearing testimony, Ms. Suenishi was uncertain of the actual amount of time she took off from work at the Navy Exchange due to the injury. Although her Navy Exchange pay records for the fall of 2001 are in evidence and contained varying hours of employment and paid leave (CX 2 and EX 7), Ms. Suenishi did not specifically identify which periods of absences were due to her left knee injury. Second, in April 2002, Dr. Walcyk

Issue No. 3 – Cumulative Bilateral Knee Injuries

A. Causation

As of October 28, 2002, Ms. Suenishi claims she has suffered injuries to both knees due to the cumulative effect of her work at the Navy Exchange and seeks medical benefits.[12] The Employer contests causation and her entitlement to benefits. In light of the medical evidence in this case, I will analyze the two components of this cumulative claim, the right knee and left knee, separately.

Cumulative Right Knee Injury

As a preliminary matter, I must first consider whether Ms. Suenishi has an injury, as defined by the Act. Again, another set of principles provides the framework for that analysis.

Section 2 (2) of the Act, 33 U.S.C. § 902 (2), defines a compensable injury as an accidental injury arising out of and in the course of employment. The term, "injury" is considered to encompass both physical harm and conditions which indicate something had gone wrong within the human frame. *Wheatley v. Adler,* 407 F.2d 307 (D.C. Cir. 1968). If something unexpectedly goes wrong within the human frame, whether by lesion or change in any part of the system, which produces harm, pain, or lessens facility of natural use, even if it occurs in the course of usual and ordinary work, a claimant has sustained an accidental injury. *McGuigan v. Washington Metropolitan Area Transit,* 10 BRBS 261, 263 (1979) and *Gardner v. Bath Iron Works Corp.,* 11 BRBS 556, 558 (1979), *aff'd sub. nom, Gardner v. Director, OWCP,* 640 F.2d 1385 (1st Cir. 1981). If an initial medical condition progresses into complications more serious than the original injury, the additional complications represent compensable injuries. *Andras v. Donovan,* 414 F.2d 241 (5th Cir. 1969). An injury may develop over a period of employment and still be considered accidental. *Gencarelle v. General Dynamics Corp*., 22 BRBS 170 (1989), *aff'd*892 F.2d 173 (2d Cir. 1989) (synovitis of the knee, an arthritic condition aggravated by repeated bending, stooping, and climbing on the job, may be considered an accidental injury rather than an occupational disease). According to the Benefits Review Board ("Board" or "BRB"), credible complaints of subjective symptoms and pain may be sufficient to establish an injury under the Act. *See Sylvester v. Bethlehem Steel Corp.*, 14 BRBS 234, 236 (1981), *aff'd sub nom., Sylvester v. Director,* OWCP, 681 F.2d 359 (5th Cir. 1982). Finally, a claimant suffers

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determined Ms. Suenishi has reached medical stability, or maximum medical improvement, which means the nature of her injury/impairment became permanent. And, since Ms. Suenishi continued to work, the extent of her disability was also partial. At that point, Ms. Suenishi would have a permanent partial disability involving her left leg. As a result, any disability compensation would be determined under the scheduled injury section of the Act, Section 8 (c). Part of the calculation of such compensation involves a determination of the percentage of loss of use of the left leg due to the knee injury. Dr. Walcyk declined to provide such an impairment rating. Consequently, Ms. Suenishi's claim for permanent partial disability would be denied.

[12]Since the condition of Ms. Suenishi's knees has not yet adversely affected her earning capability, she continues to work, and no disability rating has been presented, she would not be able to meet the requirements for disability compensation. However, as discussed earlier, even if she has suffered a work-related injury which fails to meet the compensation requirements of Section 8, Ms. Suenishi may nevertheless still be entitled to medical benefits under Section 7.

an injury if her employment aggravates a non-work-related, underlying disease or condition to the extent the claimant suffers incapacitating symptoms. *Preziosi v. Controlled Indus.*, 22 BRBS 468 (1989).

In light of the two stipulated work-related injuries to the right knee, subsequent right knee surgery, and Ms. Suenishi's credible complaints of persistent, though varying, pain and continuing periodic functional difficulties, I conclude that something has gone wrong in Ms. Suenishi's right knee such that she has an injury.

In terms of causation, absent substantial evidence to the contrary, Section 20 (a) of the Act, 33 U.S.C. § 920 (a), establishes a presumption that a disabling condition is causally related to employment if: a) the claimant suffered a bodily harm or injury; and, b) employment conditions existed or a work accident occurred which could have caused, aggravated, or accelerated the harm or condition. *Gencarelle v. General Dynamics Corp.* 22 BRBS 170 (1989), *aff'd* 892 F.2d 173 (2 Cir. 1989). In other words, the Act establishes a causation presumption that such an injury is work-related.

Since I have determined that something is functionally wrong with Ms. Suenishi's right knee, she has satisfied the first requirement of the causation presumption. Concerning the second requirement, until very recently, Ms. Suenishi's Navy Exchange employment involved occasional, but still repetitive, squatting, carrying of heavy items, and climbing ladders. Additionally, due to the condition of Ms. Suenishi's knees, and potential aggravating consequences of these activities, Dr. Walcyk's has placed permanent limitations on her squatting and climbing. Due to these two factors, I conclude that Ms. Suenishi's Navy Exchange repetitive employment activities could have played a role in the present condition of her right knee. Accordingly, Ms. Suenishi is able to invoke the causation presumption under Section 20 (a) that the long term and cumulative effects of her employment with the Navy Exchange has caused the present right knee injury.

To rebut the Section 20 (a) causation presumption, the employer must present specific medical evidence proving the absence of, or severing, the connection between the bodily harm and the employee's working condition. *Parsons Corp. v. Director, OWCP (Gunter)*, 619 F.2d 38 (9th Cir. 1980). The U.S. Circuit courts have rendered different views on the extent of such evidence. In *Brown v. Jacksonville Shipyards, Inc.*, 554 F.2d 1075 (11th Cir. 1990), the U.S. Court of Appeals for the Eleventh Circuit required the employer to produce evidence which ruled out the possibility of a causal relationship between the claimant's employment and injury. On at least one occasion, the BRB has taken a similar position. *Quinones v. H. B. Zachery, Inc.*, 32 BRBS 6, (1998). On the other hand, in *Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684 (5th Cir. 1999), the U.S. Court of Appeals for the Fifth Circuit rejected the "rule out" standard. Instead, according to that court, an employer must produce evidence that a reasonable mind might accept as adequate to support a conclusion that the accident did not cause the injury.

Since Ms. Suenishi's case arises in the Ninth Circuit, I turn to the case of *Stevens v. Todd Pacific Shipyards*, 14 BRBS 626 (1982) *aff'd mem.* 722 F.2d 747 (9th Cir. 1983), *cert. denied* 467 U.S. 1243 (1984), which tilts towards the *Conoco* standard. In *Stevens*, the appellate court affirmed a determination that when a work-related accident occurs which is followed by an

injury, the employer need only introduce medical testimony controverting causation and does not have to prove another causation agent to rebut the presumption.

In his deposition questioning of Dr. Walcyk, counsel for the Employer obtained from the physician a statement that Ms. Suenishi's weight problem could have caused the progression of the knees' condition. Through her acknowledgment, coupled with Dr. Zane's diagnosis of obesity, the Employer presented medical evidence of a non-work-related cause for Ms. Suenishi's present knee situation. That evidence serves as sufficient rebuttal of the causation presumption.

Once the Section 20 (a) presumption is rebutted, it no longer controls the adjudication. *Swinton v. J. Frank Kelly, Inc*. 554 F.2d 1075 (D.C. Cir.) *cert. denied* 429 U.S. 820 (1976). Instead, all the evidence in the record must be evaluated and the causation issue is then determined based on the preponderance of the evidence. *Noble Drilling Co. v. Drake*, 795 F.2d 478 (5th Cir. 1986).

Since the Section 20 (a) causation presumption has been rebutted, Ms. Suenishi must establish by the preponderance of the evidence that her employment with the Navy Exchange has caused, accelerated or aggravated the condition of her right knee.

The record contains the following information about the condition of the right knee. Ms. Suenishi did not have knee problems prior to December 1, 1996. The stipulations and record establish that Ms. Suenishi suffered two traumatic blows to her right knee in December 1996 and August 1997 while working at the Navy Exchange. In July 1997, Ms. Suenishi had surgery on her right knee that did not improve the condition of the knee. Since the operation, Ms. Suenishi has experienced right knee pain off and on. Her right knee swells, clicks, gives way and locks up periodically. Based on her examination of Ms. Suenishi's left knee and considering the bilateral nature of degenerative arthritis, Dr. Walcyk believes Ms. Suenishi has degenerative arthritis in the right knee. She opined that repeated squatting and climbing would aggravate degenerative arthritis; however, she couldn't say whether the right knee had been aggravated. Dr. Marzoff diagnosed osteoarthritis of the right knee aggravated by work. According to Ms. Suenishi, Dr. Kahn diagnosed arthritis. Dr. Zane diagnosed degenerative arthritis, obesity and mild osteoarthritis and recommended avoidance of squatting, climbing and kneeling. For nearly 14 years, Ms. Suenishi periodically stocked shelves at the Navy Exchange that required her to squat and climb at times. For about 20 years, Ms. Suenishi worked as a full-time hospital cook. That work required regular lifting of heavy pots which bothered her knees. In 2000, Ms. Suenishi had to stop working as a cook because she could no longer accomplish the heavy lifting.

In evaluating this evidentiary record, I first assess the probative value of the medical opinions in terms of documentation and reasoning. A physician's medical opinion is likely to be more comprehensive and probative if it is based on extensive objective medical documentation such as radiographic tests and physical examinations. *Hoffman v. B & G Construction Co.*, 8 B.L.R. 1-65 (1985). A doctor's reasoning that is both supported by objective medical tests and consistent with all the documentation in the record, is entitled to greater probative weight. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19 (1987). Additionally, to be considered well reasoned,

the physician's conclusion must be stated without equivocation or vagueness. *Justice v. Island Creek Coal Co.*, 11 B.L.R. 1-91 (1988).

All four physicians who have recently considered the condition of Ms. Suenishi's right knee agree that she has arthritis.[13] In considering the respective probative value of the doctors' conclusions, I first note that neither Dr. Kahn nor Dr. Zane addressed causation of the diagnosed arthritis.

In contrast, Dr. Marzoff opined the right knee condition involved work-related aggravation of the osteoarthritis in the right knee. His assessment has diminished probative value due to documentation and reasoning issues. The content of Dr. Marzoff's diagnosis and opinion was obtained from Dr. Walcyk during her deposition based on her review of the medical record. Other than reporting his diagnosis and final conclusion, Dr. Walcyk did not indicate the documentation utilized by Dr. Marzoff in reaching his conclusion. This deficiency becomes readily apparently when realizing that Ms. Suenishi worked two jobs. Dr. Marzoff's reported causation finding does not indicate whether her work as a hospital cook or sales clerk, or both was the source of the aggravation. Dr. Walcyk's summary of Dr. Marzoff's findings also does not contain any explanation of how he reached his causation conclusion. As a result, I give Dr. Marzoff's reported causation finding little probative value.

Finally, Dr. Walcyk, as a recent treating physician, had an excellent opportunity to present a well documented, reasoned, and probative opinion on causation. The deposition presented an excellent forum for an explanation of her assessment, and her extensive contact with Ms. Suenishi should have provided the requisite documentary foundation. Yet, in regards to the right knee, her reasoning is inconsistent, which adversely affects the probative value of her causation opinion. Dr. Walcyk explained that while she focused on the left knee based on Ms. Suenishi' pain presentation, she was still able to diagnose degenerative arthritis in the right knee due to the condition's bilateral nature. She concluded that the repetitive tasks at the Navy Exchange would aggravate the left knee's degenerative arthritis which implies such aggravation would affect the right knee too. Yet, when specifically asked about the right knee, Dr. Walcyk emphasized that she did not physically examine the right knee, could not state whether its condition had been aggravated, and declined to state that Ms. Suenishi had suffered cumulative injury to the right knee. With this presentation, Dr. Walcyk's medical opinion does not support a finding that Ms. Suenishi suffered a cumulative injury to her right knee.

In summary, for various reasons, the medical opinion before me is insufficient to prove that Ms. Suenishi has a cumulative injury to her right knee due to her work at the Navy Exchange. No physician provided a definitive conclusion that her sales clerk repetitive tasks caused, aggravated or accelerated her right knee degenerative arthritis. At the same time, as discussed earlier, Ms. Suenishi's continuing right knee problem is related to her two accidents at the Navy Exchange. Essentially, since her 1997 right knee surgery, Ms. Suenishi's right knee condition has remained problematic. As a result, to the extent she could have established that

[13]Unfortunately, one potentially probative medical opinion is not in the record. By conducting arthroscopic surgery on Ms. Suenishi's right knee in 1997, Dr. Yee was well positioned to report on the condition of her knee since such a procedure involves an internal examination.

medical treatment was necessary and reasonable for the continuing nature of her traumatic right knee injuries, medical benefits would have been appropriate. In other words, upon sufficient proof, which I have found lacking in this present claim, Ms. Suenishi would be entitled to medical benefits for her right knee. The basis for that entitlement is the two work-related right knee injuries and corresponding unsuccessful right knee surgery, rather than a cumulative injury to her right knee due to the repetition and physical stress of her sales clerk work.

Cumulative Left Knee Injury

Concerning the left knee, the injury/causation/evidence analysis understandably parallels the cumulative right knee injury discussion. Through radiographic evidence, Dr. Walcyk's diagnosis, and her credible complaints of left knee pain and dysfunction, Ms. Suenishi has demonstrated that something has gone wrong with her left knee. Although I have already determined the left knee damage caused by the November 2001 accident is not covered by the Act, Dr. Walcyk has also opined that Ms. Suenishi has degenerative arthritis. In addition, Ms. Suenishi presented credible testimony that following her 1997 right knee surgery, she started having problems with her left knee. Consequently, I believe Ms. Suenishi has demonstrated the presence of a left knee injury.

Based on consideration of the repetitive squatting and climbing tasks along with Dr. Walcyk's work restrictions, I believe her Navy Exchange activities could have caused, aggravated or accelerated the abnormal condition of her left knee. Consequently, Ms. Suenishi is able to invoke the Section 20 (a) causation presumption. In a familiar manner, through Dr. Walcyk's acknowledgment that obesity may be progressing the knees' condition, the Employer has rebutted the causation presumption.

So, I return to the evidentiary record. Because she has favored her right knee due to its pain, Ms. Suenishi sometimes has problems with the left knee. She struggles with varying pain in her left knee. Sometimes, the left knee pops and occasionally it gives way. Dr. Kahn diagnosed arthritis. Dr. Zane found degenerative arthritis and suggested avoiding squatting, climbing, and kneeling. Based on physical examinations showing the recurrent effusion, radiographic imaging revealing mild degenerative arthritis with partial loss of the medial meniscus, and the November 10, 2001 accident, Dr. Walcyk diagnosed aggravation of degenerative arthritis in the left knee. Again, according to Dr. Walcyk, repeated squatting and climbing would aggravate Ms. Suenishi's degenerative arthritis. Likewise, Ms. Suenishi worked 20 years as a cook carrying heavy items and about 14 years as a sales associate stocking merchandise on shelves.

While the three physicians agree Ms. Suenishi has arthritis in her left knee,[14] only Dr. Walcyk considered its cause. However, her opinion has probative value problems due to a documentation issue and the circumstances surrounding her treatment of Ms. Suenishi's left knee injury. While her medical documentation in regards to the condition of the left knee was solid, Dr. Walcyk had a less than complete picture of Ms. Suenishi's work environment. In the absence of a job description, Dr. Walcyk was not aware of the actual frequency or intensity of

[14]According to Dr. Walcyk's summary, Dr. Marzoff only addressed the condition of Ms. Suenishi's right knee.

the repetitive Navy Exchange activities. Apparently, recognizing this deficiency, Dr. Walcyk acknowledged that she could not provide a "scientific" causation conclusion. Also, significantly, Dr. Walcyk made no mention of Ms. Suenishi's 20 plus years as a hospital cook and thus did not consider the relationship between its heavy lifting demands and the condition of Ms. Suenishi's left knee.

More problematic, due to the circumstances of Ms. Suenishi's presentation, Dr. Walcyk was principally focused on the condition and treatment of the left knee after the November 10, 2001 accident. Based on her evaluations, Dr. Walcyk diagnosed aggravated degenerative arthritis due to that accident. Consequently, her conclusion that Ms. Suenishi's squatting and climbing activities would aggravate her condition, was given within the context of the treatment for the traumatic, twisting injury. The referenced left knee condition was the status of Ms. Suenishi's knee after the November 10, 2001 trauma. Significantly, Dr. Walcyk did not specifically address whether Ms. Suenishi had also suffered a work-related cumulative injury to the left knee prior to twisting her knee on the muddy road. In fact, Dr. Walcyk stated that she never used the term "cumulative injury." Since Dr. Walcyk focused on the post-November 10, 2001 condition of Ms. Suenishi's left knee, her conclusion that squatting and climbing would aggravate the degenerative arthritis does not establish that prior to the non-work-related left knee accident in November 2001 those activities had already aggravated her left knee.

In light of the documentary shortfall, her specific disclaimer concerning a cumulative injury diagnosis, and since Dr. Walcyk's left knee diagnosis is tied to the November 10, 2001 injury, her assessment provides little probative evidence that Ms. Suenishi has also suffered a cumulative injury to the same knee.

Upon consideration of the medical evidence concerning Ms. Suenishi's left knee, I find insufficient evidence to establish that she has suffered a cumulative injury to her left knee. Most of her left knee difficulties appear to be consequentially related to the November 10, 2001 traumatic accident, which I have determined is not a compensable injury. Some of Ms. Suenishi's pre-November 2001 left knee problems may also have been related to her traumatic right knee injuries and a possible altered gait.[15] Ms. Suenishi's pain complaints from that period suggest such a connection. However, no physician has discussed that relationship and such a condition would still remain unconnected to any cumulative injury due to repetitive sales clerk stocking because I have determined the right knee injury was induced by traumatic accidents rather than repetitive activities.

Conclusion

The preponderance of the evidentiary record fails to prove that Ms. Suenishi has suffered a cumulative injury to either her right or left knee due to her employment at the Navy Exchange. Ms. Suenishi struggles with right knee pain and dysfunction, and consequential left knee pain.

[15] *See Uglesich v. Stevedoring Servs. Of America*, 24 BRBS 180 (1981) (according to the Benefits Review Board, if a claimant suffers a work-related injury to the right knee and as a consequence stresses and adversely affects the left knee, the condition of the left knee may be considered a natural and unavoidable consequence of the injury to the right knee, thereby becoming a work-related injury).

However, those conditions relate to her 1996 and 1997 accidents, an unsuccessful right knee surgery, and a non-compensable November 10, 2001 injury, rather than cumulative injuries due to repetitive merchandise stocking work. Accordingly, since Ms. Suenishi has failed to prove a cumulative injury to either knee, her claim for cumulative bilateral knee injuries must be denied.[16]

ORDER

Based on my findings of fact, conclusions of law, and the entire record, I issue the following order.

1. The claim of MS. BETTY Y. SUENISHI for medical benefits due to a right knee injury caused by a December 1, 1996 accident is **DENIED**.

2. The claim of MS. BETTY Y. SUENISHI for medical benefits due to a right knee injury caused by an August 20, 1997 accident is **DENIED**.

3. The claim of MS. BETTY Y. SUENISHI for disability compensation and medical benefits due to a left knee injury caused by a November 10, 2001 accident is **DENIED**.

4. The claim of MS. BETTY Y. SUENISHI for medical benefits due to cumulative bilateral knee injuries as of October 28, 2002 is **DENIED**.

SO ORDERED:

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RICHARD T. STANSELL-GAMM
Administrative Law Judge

Date Signed: July 16, 2004
Washington, DC

[16]Since Ms. Suenishi has not established causation, I will not address nature and extent of any resulting disability or entitlement to medical benefits.